

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Amendment of Section 73.202(b)

Table of Allotments,

FM Broadcast Stations

(Auburn, Northport, Tuscaloosa, Camp Hill,

Gardendale, Homewood, Birmingham, Dadeville

Orville, Goodwater, Pine Level, Jemison, and

Thomaston, Alabama)

MM Docket No. 01-104

RM-10103

RM-10323

RM-10324

To: Chief, Media Bureau

**PETITION FOR RECONSIDERATION
OF COX RADIO, INC., CXR HOLDINGS, INC.,
AND RADIO SOUTH, INC.**

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CXR HOLDINGS, INC.**

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October 9, 2002

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WASHINGTON, D.C. 20554

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SUMMARY

Cox Radio, Inc. and its wholly-owned subsidiary CXR Holdings, Inc. (collectively, “Cox”) and Radio South, Inc. (“Radio South”), by their attorneys, hereby petition for reconsideration of the Audio Division’s (the “Division’s”) decision in MM Docket No. 01-104 (the “Auburn Proceeding”). The Division erroneously dismissed Cox’s and Radio South’s counterproposals because they proposed allotments that were short-spaced to a deleted allotment at Anniston, Alabama, and the decision deleting that allotment is not yet final due to the filing of a fourth petition for reconsideration in that proceeding.

The Division’s decision dismissing Cox’s and Radio South’s counterproposals must be reversed because it is fraught with legal and factual errors. The Division’s conclusion that Cox’s and Radio South’s counterproposals are required to protect the deleted Anniston allotment due to the pendency of the Anniston/College Park Proceeding contradicts the Division’s own prior actions within the Auburn Proceeding itself. The Division’s decision also misapplied *Cut and Shoot* and relies on inapposite cases. Moreover, without good cause, the Division treats Cox and Radio South differently than other similarly-situated applicants whose applications or rulemaking proposals have been granted or held in abeyance pending finality of the Anniston/College Park Proceeding.

Accordingly, the Division should grant Cox’s and Radio South’s counterproposals forthwith, and, if necessary for consistent application of FCC policy and precedent, conditioned on the finality of the Anniston/College Park Proceeding.

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Amendment of Section 73.202(b))	
Table of Allotments,)	MM Docket No. 01-104
FM Broadcast Stations)	RM-10103
(Auburn, Northport, Tuscaloosa, Camp Hill,)	RM-10323
Gardendale, Homewood, Birmingham, Dadeville)	RM-10324
Orrville, Goodwater, Pine Level, Jemison, and)	
Thomaston, Alabama))	

To: Chief, Media Bureau

PETITION FOR RECONSIDERATION

Cox Radio, Inc. and its wholly-owned subsidiary CXR Holdings, Inc. (collectively "Cox") and Radio South, Inc. ("Radio South"), by their attorneys and pursuant to Section 1.429 of the Commission's Rules,¹ hereby petition for reconsideration of the decision of the Audio Division (the "Division") in the above-referenced proceeding (the "Auburn Decision" or "Auburn Proceeding").² As shown herein, the Division erred as a matter of law in dismissing Cox's and Radio South's counterproposals. The Division ignored and misapplied its own precedent and without good cause treated Cox and Radio South differently than other similarly-situated parties. Accordingly, the Auburn Decision must be reversed and Cox's and Radio

¹ 47 C.F.R. § 1.429 (2001). Public notice of the Auburn Decision was given on September 9, 2002. Accordingly, this petition for reconsideration is timely filed. *See 67 Federal Register* 57203 (Sept. 9, 2002); 47 C.F.R. §§ 1.429(d), 1.4(b) (2001).

² *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Auburn, Northport, Tuscaloosa, Camp Hill, Gardendale, Homewood, Birmingham, Dadeville, Orrville, Goodwater, Pine Level, Jemison, and Thomaston, Alabama), Report and Order*, 2002 FCC Lexis 4267 (Aug. 30, 2002).

South's counterproposals granted forthwith and, if necessary for consistent application of FCC policy and precedent, conditioned on the finality of the Anniston/College Park Proceeding.³

I. HISTORY OF THE AUBURN PROCEEDING.

On July 5, 2000, Auburn Network, Inc. filed a petition for rulemaking proposing to allot Channel 263A to Auburn, Alabama, as its second local service ("ANI's Initial Petition"). As set forth in Exhibit B of the Technical Exhibit attached to ANI's Initial Petition, the proposed allotment at Auburn was short-spaced to a deleted Channel 263C allotment at Anniston, Alabama for WWWQ(FM) (formerly WHMA(FM)) and fully-spaced to the added Channel 263C3 allotment at College Park, Georgia for WWWQ(FM).⁴ The Channel 263C Anniston allotment was deleted by a *Report and Order* that was released on April 28, 2000 and became effective on June 14, 2000 (the "Anniston/College Park Proceeding").⁵ On November 20, 2000, the Division returned ANI's Initial Petition because it was contingent on the finality of the Anniston/College Park Proceeding.⁶

On February 7, 2001, the same day that the Commission adopted a *Memorandum Opinion and Order* in the Anniston/College Park Proceeding, Auburn Network, Inc. filed an updated petition for rulemaking proposing to allot Channel 263A to Auburn, Alabama ("ANI's

³ *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Anniston and Ashland, Alabama, and College Park, Covington, Milledgeville and Social Circle, Georgia), Report and Order*, MM Docket 98-112, 15 FCC Rcd 9971 (2000) (the "Anniston/College Park Proceeding").

⁴ Petition for Rulemaking for the Amendment of Section 73.202(b), Table of Allotments, filed by Auburn Network, Inc., Exhibit B of Technical Exhibit (July 5, 2000).

⁵ *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Anniston and Ashland, Alabama, and College Park, Covington, Milledgeville and Social Circle, Georgia), Report and Order*, MM Docket 98-112, 15 FCC Rcd 9971 (2000) The decision became effective on June 14, 2000. 65 *Federal Register* 31498 (May 18, 2000).

⁶ See Petition for Reconsideration and Reinstatement filed by Auburn Network, Inc. in MM Docket 01-104 at p. 2 (May 2, 2001).

Updated Petition"). Like ANI's Initial Petition, the proposed allotment at Auburn again was short spaced to the deleted Channel 263C allotment at Anniston and fully-spaced to the added Channel 263C3 allotment at College Park.⁷

On April 4, 2001, the Division returned ANI's Updated Petition for failing to protect WWWQ(FM)'s January 12, 2001 application proposing to upgrade its facilities at College Park from Channel 263C3 to Channel 263C2.⁸ On April 6, 2001, Auburn Network, Inc. filed a supplement notifying the Division that on February 23, 2001, WWWQ(FM) had amended its upgrade application to specify a new tower site and Channel 263A therefore could be allotted to Auburn, Alabama with a site restriction to protect WWWQ(FM)'s upgraded facilities at the new site. Importantly, although another petition for reconsideration had been filed in the Anniston/College Park Proceeding on March 12, 2001 (and refiled on March 30, 2001), the Division did not reject ANI's Updated Petition for being contingent on final action in the Anniston/College Park Proceeding, as it had done with ANI's Initial Petition. Instead, the Division accepted ANI's Updated Petition and, on April 27, 2001, released a *Notice of Proposed Rulemaking* proposing to allot Channel 263A at Auburn, Alabama as its second local service (the "Auburn NPRM"). In the Auburn NPRM, the Division stated, "We believe that each proposal [in the multiple docket proceeding] warrants consideration because it complies with our technical requirements and would serve the public interest."⁹

⁷ Petition for Rulemaking for the Amendment of Section 73.202(b), Table of Allotments, filed by Auburn Network, Inc., MM Docket 01-104, Exhibit B of Technical Exhibit (Feb. 7, 2001).

⁸ Petition for Reconsideration and Reinstatement in the Amendment of Section 73.202(b), Table of Allotments, filed by Auburn Network, Inc., MM Docket 01-104, at p.1 (May 2, 2001).

⁹ *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Plainville, Georgia) (Rosholt, Wisconsin) (Auburn, Alabama) (Shiner, Texas) (Pacific City, Oregon)*, 6 FCC Rcd 8937, ¶ 1 (2001) (emphasis added).

In response to the Auburn NPRM, on June 18, 2001, Cox filed a counterproposal proposing to provide first local service to the communities of Gardendale, Goodwater and Jemison, Alabama, while maintaining local service in Homewood, Alabama ("Cox's Counterproposal").¹⁰ On June 18, 2001, Radio South filed a counterproposal proposing to provide first local service to the community of Helena, Alabama ("Radio South's Counterproposal").¹¹ Like Auburn Network, Inc.'s proposed Auburn allotment, Cox's proposed substitution of Channel 262A for Channel 247A at Dadeville, Alabama, and Radio South's proposed reallocation of Channel 263C1 from Northport to Helena, Alabama were short-spaced to the deleted Channel 263C allotment at Anniston, Alabama and fully-spaced to the added Channel 263C3 allotment (and the proposed upgraded Channel 263C2 allotment) at College Park, Georgia. International Systems Corp. also filed a counterproposal, and WNNX LICO, Inc., the licensee of WWWQ(FM), and Tiger Communications, Inc. filed comments.

¹⁰ Comments and Counterproposal of Cox Radio, Inc. and CXR Holdings, Inc., filed in MM Docket No. 01-104, RM-10103 on June 18, 2001. Specifically, Cox proposed to delete Channel 247A at Homewood, Alabama, and allot Channel 247C2 at Gardendale, Alabama, for use by WODL(FM) (formerly WRLR(FM)) as that community's first local service; to reallocate Channel 295C from Birmingham to Homewood for use by WBPT(FM) (formerly WODL(FM)); to substitute Channel 262A for Channel 247A at Dadeville for WZLM(FM); to substitute Channel 300A for Channel 247A in Orrville, Alabama, for WJAM-FM; to reallocate Channel 248A from Talladega to Goodwater, Alabama, for use by WSSY-FM as a first local service; to modify the reference coordinates of vacant, unapplied-for Channel 248A, Pine Level, Alabama; to reallocate Channel 249A from Clanton to Jemison, Alabama, for use by WEZZ-FM as a first local service; and to modify the reference coordinates of WAYI(FM), Channel 249A, Thomaston, Alabama. Cox provided copies of consents from the licensees of all affected stations and pledged to reimburse the licensees for reasonable costs in implementing the requested modifications. *Id.* at pp. 2, 3, 18, 25, 26, 27-28, 32, 33, 37, 39 and at Exhibits A, E, F, G, I, K.

¹¹ Comments and Counterproposal of Radio South, Inc., filed in MM Docket No. 01-104, RM-10103 on June 18, 2001. Specifically, Radio South proposed to reallocate Channel 263C1 from Northport to Helena, Alabama, for use by WLXY(FM) as that community's first local service and to reallocate Channel 225C1 from Tuscaloosa to Northport, Alabama, for use by WTUG(FM).

On October 23, 2001, the Division released a Public Notice announcing its acceptance of Cox's and Radio South's Counterproposals.¹² The Division did not accept International Systems Corp.'s counterproposal. No parties filed comments opposing Cox's or Radio South's Counterproposals.

On August 30, 2002, the Division released the Auburn Decision, dismissing Cox's and Radio South's Counterproposals.¹³ In the Auburn Decision, the Division stated that both counterproposals "were technically defective when filed" because the reference coordinates for Cox's proposed Dadeville allotment and Radio South's proposed Helena allotment were short-spaced to the deleted Channel 263C allotment at Anniston, Alabama, and the Anniston/College Park Proceeding was not yet final.¹⁴

II. HISTORY OF THE ANNISTON/COLLEGE PARK PROCEEDING.

On April 28, 2000, the Division released its decision in the Anniston/College Park Proceeding, among other things, deleting Channel 263C at Anniston, Alabama and allotting Channel 263C3 to College Park, Georgia for use by WWWQ(FM) (formerly WHMA(FM)) (the "Anniston/College Park Decision").¹⁵ The Anniston/College Park Decision was effective on June 14, 2000, and pursuant to the decision, WNNX LICO, Inc. filed a construction permit

¹² Consumer Information Bureau, Reference Information Center, Petition for Rule Making Filed. *Public Notice*, Report No. 2506 Correction (rel. Oct. 23, 2001) (Correcting Report No. 2506 released Oct. 5, 2001 and Oct. 9, 2001) ("*Public Notice*").

¹³ The Division also dismissed ANI's Updated Petition given that Auburn Network, Inc. had withdrawn its expression of interest.

¹⁴ Auburn Decision at ¶ 3.

¹⁵ *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Anniston and Ashland, Alabama, and College Park, Covington, Milledgeville and Social Circle, Georgia), Report and Order*, MM Docket 98-112, 15 FCC Rcd 9971 (2000). The decision became effective on June 14, 2000. 65 *Federal Register* 31498 (May 18, 2000).

application to construct WWWQ(FM) on Channel 263C3 at College Park,¹⁶ which was granted on November 14, 2000. On January 9, 2001, WNNX LICO, Inc. filed a license application to cover WWWQ(FM)'s constructed College Park facilities,¹⁷ and on January 22, 2001, the Division granted WWWQ(FM) program test authority to commence operation with its College Park facilities. WWWQ(FM) has now been operating from College Park for well over a year and a half. Its license application remains pending, however, because since 2000, Preston Small, one of the parties to the Anniston/College Park Proceeding, has continued to file petitions for reconsideration.

On June 16, 2000, Preston Small filed his first petition for reconsideration, and on February 9, 2001, the Division released a Memorandum Opinion and Order denying his petition. On March 12, 2001, Preston Small filed his second petition for reconsideration, and on November 8, 2001, the Commission released a Memorandum Opinion and Order denying his second petition. On December 5, 2001, Preston Small filed his third petition for reconsideration and a motion to reopen the record, and on July 15, 2002, the Commission released a Memorandum Opinion and Order denying his third petition and motion. On August 19, 2002, and August 22, 2002, Preston Small filed his fourth petition for reconsideration and a second motion to reopen the record and a supplement, respectively.¹⁸ Based on the filing of this fourth

¹⁶ See FCC File No. BPH-20000714AAV.

¹⁷ See FCC File No. BLH-20010109AAD.

¹⁸ On September 3, 2002, Preston Small filed a Statement for the Record, Motion for Protection, and Notice of Resubmission of Petition for Reconsideration and Second Motion to Reopen the Record and Notice of Resubmission of Motion To [sic] for Leave to File Supplement. As he explained in that filing, on September 3, 2002, he concurrently resubmitted his August 19, 2002 Petition for Reconsideration and Second Motion to Reopen the Record and his August 22, 2002 Motion for Leave to File Supplement to Petition for Reconsideration and Second Motion to Reopen the Record.

petition for reconsideration. In the Auburn Decision, the Division dismissed Cox's and Radio South's Counterproposals.

III. THE AUBURN DECISION IS INCONSISTENT WITH PRECEDENT.

The Auburn Decision is inconsistent with (i) the Division's own actions in the Auburn Proceeding, (ii) its own case precedent, and (iii) its treatment of other proposals that are contingent on the finality of the Anniston/College Park Proceeding. As demonstrated herein, pursuant to the Division's own precedent, the Division should have granted Cox's and Radio South's Counterproposals forthwith or granted them conditioned on the finality of the Anniston/College Park Proceeding.

A. The Auburn Decision Is Inconsistent With the Division's Own Actions In the Auburn Proceeding.

The Division's conclusion that Cox's and Radio South's Counterproposals were required to protect the deleted Anniston allotment and could not be granted is wholly inconsistent with its prior actions within the Auburn Proceeding. On November 20, 2000, the Division returned ANI's Initial Petition for being contingent on finality of the Anniston/College Park Proceeding. On April 27, 2001, however, the Division accepted ANI's Updated Petition, released the Auburn NPRM, and stated that ANI's Updated Petition complied with the technical requirements despite the fact that it was contingent on finality of the Anniston/College Park Proceeding inasmuch as Preston Small had filed his second petition for reconsideration on March 12, 2001. The Division surely was aware of the second petition for reconsideration filed over one month prior to the Auburn NPRM's release and therefore must have determined that the pendency of the second petition for reconsideration and the short-spacing of the proposed allotment of Channel 263A at Auburn were no longer a legal or technical bar to grant of ANI's Updated Petition. On October

23. 2001, the Division issued a Public Notice accepting Cox's and Radio South's Counterproposals, which was consistent with its treatment of ANI's Updated Petition.

In the Auburn Decision released on August 30, 2002, more than one year and four months after the Division accepted ANI's Updated Petition and ten months after the Division accepted Cox's and Radio South's Counterproposals, the Division abruptly changed course. The Division suddenly took the position that proposed allotments must protect the deleted Anniston allotment because Preston Small had filed a fourth petition for reconsideration in the Anniston College Park Proceeding. Despite the fact that the second petition for reconsideration was pending when the Division accepted ANI's Updated Petition, Cox's Counterproposal, and Radio South's Counterproposal, the Division considered the fourth petition for reconsideration a bar to grant of Cox's and Radio South's Counterproposals.

The Division's acceptance of ANI's Updated Petition, Cox's Counterproposal, and Radio South's Counterproposal coupled with its subsequent sudden change in course has substantially harmed Cox and Radio South. On April 27, 2001, the Division accepted ANI's Updated Petition and on October 23, 2001, accepted Cox's and Radio South's Counterproposals as technically correct. Cox and the affected parties relied on the Division's actions and expended substantial amounts of time and money on preparation and submission of further pleadings in the proceeding. Regulated parties should be allowed to rely on a government agency's actions and are entitled to assume that the staff decisions are consistent and evenly applied. Nothing has changed since the April 27, 2001 Auburn NPRM and the October 23, 2001 Public Notice, yet, *the Division's decision is implicitly based on an alleged change in circumstances. The fundamental inequity is inescapable. The Division's about-face on this issue within the same proceeding without any explanation as to its inconsistent treatment of ANI's Updated Petition,*

Cox's Counterproposal, and Radio South's Counterproposal is arbitrary and capricious and cannot stand.¹⁹

B. The Auburn Decision Is Inconsistent with Prior Precedent.

1. The Division Misapplied *Cut and Shoot*.

In the Auburn Decision, the Division adopts a very wooden interpretation of *Cut and Shoot* and misapplies it to the facts. In *Cut and Shoot*, the proposed allotment of Channel 235A at Cut and Shoot, Texas was short-spaced to another station's licensed facilities but fully spaced to unbuilt facilities specified in a construction permit.²⁰ The petition for rulemaking proposing the Cut and Shoot allotment was returned because the proposed allotment was contingent on a third party constructing the permitted facilities. The policy behind the holding in *Cut and Shoot* is to prevent the filing of applications that are contingent upon the future construction and licensing of another station that, in fact, might never be built. In this case, however, WWWQ(FM)'s College Park facilities (serving the Atlanta market) were constructed and on the air, and a license application had been filed more than six months before Cox and Radio South filed their counterproposals. The Division misapplied *Cut and Shoot* in dismissing Cox's and Radio South's Counterproposals as contingent when WWWQ(FM)'s facilities already were built and had been on the air for over a year. The policy underlying *Cut and Shoot* is not served by applying it to the facts and circumstances presented by Cox's Counterproposal and Radio South's Counterproposal.

By relying on *Cut and Shoot*, the Division failed to take into account the unusual circumstances presented herein. The filing of four petitions for reconsideration by Preston Small

¹⁹ See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970); *Melbay Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965).

in the Anniston/College Park Proceeding constitutes a very unique abuse of FCC processes. Commission precedent should be flexible enough to deal with this unique situation and avoid inequitable results in unrelated proceedings. Should the Division determine that *Cut and Shoot* is applicable, it should carve out a very narrow exception to *Cut and Shoot* in recognition of the unusual, special facts of this case where, but for an abuse of process in another rulemaking proceeding, Cox's and Radio South's Counterproposals faced no obstacles to grant. By creating such a narrow exception, the Division can ensure that its processes are not blind to the facts and equities of this case. To do otherwise and to allow the filing of a fourth petition for reconsideration to thwart the provision of first local service to four new communities disserves the public and essentially elevates and condones this sort of behavior.²¹

Moreover, by its actions, the Division has demonstrated that it itself does not believe that *Cut and Shoot* applies to these circumstances. As explained previously, the Division accepted ANI's Updated Petition, Cox's Counterproposal, and Radio South's Counterproposal even though they were contingent on the finality of the Anniston/College Park Proceeding. As discussed below in Section III.C., the Division also has granted other applications and issued a notice of proposed rulemaking for an allotment that do not protect the deleted Anniston allotment and are contingent on finality of the Anniston/College Park Proceeding.

²⁰ *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, (Cut and Shoot, Texas), Memorandum Opinion and Order*, 11 FCC Rcd 16383 (1996).

²¹ In fact, in deleting the rule provision that provided that the filing of a petition for reconsideration would automatically stay the effectiveness of a channel change order, the Commission's intent was to "remove an incentive for the filing of petitions for reconsideration that are largely without merit, thereby expediting the provision of expanded service to the public and conserving Commission resources now expended processing these meritless petitions." *Amendment of Section 1.420(f) of the Commission's Rules Concerning Automatic Stays of Certain Allotment Orders, Report and Order*, 11 FCC Rcd 9501, ¶ 1 (Aug. 8, 1996).

2. The Cases Cited By the Division Do Not Support Its Denial of Cox's and Radio South's Counterproposals.

In the Auburn Decision, the Division erroneously relied upon *Esperanza, Puerto Rico*, *Christansted, Virgin Islands*; *Oxford and New Albany, Mississippi*; and *Frederiksted, Virgin Islands and Culebra and Carolina, Puerto Rico* to support its conclusion that rulemaking proposals dependent on finality of another rulemaking proceeding should be dismissed.²²

Although these cases involved rulemaking proposals that were dependent on channel changes granted in another rulemaking proceeding in which a petition for reconsideration had been filed,²³ they were decided at a time when the filing of a petition for reconsideration stayed the effect of a channel change order.²⁴ Thus, the rulemaking proposals in these cases were, in fact, contingent on channel changes becoming effective in another proceeding.

In contrast, the amendments to the FM Table of Allotments adopted in the Anniston/College Park Proceeding became effective on June 14, 2000, despite Preston Small's four petitions for reconsideration.²⁵ Effective June 14, 2000, the Anniston allotment was deleted from the FM Table of Allotments and the College Park allotment had been added. As

²² See Auburn Decision at ¶ 4.

²³ *Esperanza, Puerto Rico, Christansted, Virgin Islands* 11 FCC Rcd 2908 (March 4, 1996); *Oxford and New Albany, Mississippi*, 3 FCC Rcd 615, 617 n.3 (1988), *recon.*, 3 FCC Rcd 6626 (1988); and *Frederiksted, Virgin Islands and Culebra and Carolina, Puerto Rico*, 10 FCC Rcd 13627 (Dec. 11, 1995).

²⁴ On August 8, 1996, the Commission released a *Report and Order* deleting that portion of its rules that provided for an automatic stay of channel changes upon the filing of a petition for reconsideration. *Amendment of Section 1.420(f) of the Commission's Rules Concerning Automatic Stays of Certain Allotment Orders, Report and Order*, 11 FCC Rcd 9501 (Aug. 8, 1996).

²⁵ See 47 C.F.R. § 1.429(k) ("Without special order of the Commission, the filing of a petition for reconsideration shall not excuse any person from complying with any rule or operate in any manner to stay or postpone its enforcement.").

WWWQ(FM) has done, parties are permitted to proceed and construct facilities pursuant to a decision that is subject to a petition for reconsideration.²⁶

Accordingly, the cases cited by the Division are inapposite: they were decided at a time when the legal effect of the filing of a petition for reconsideration was completely different than it was when Preston Small filed his first petition for reconsideration in the Anniston/College Park Proceeding. The proposed allotments in those cases were in fact contingent on the finality of a rulemaking because the petition for reconsideration stayed the rulemaking's effectiveness. In contrast, the Anniston/College Park Decision is effective, the Anniston allotment has been deleted and WWWQ(FM) has constructed and commenced operation with its new facilities and has filed a license application. Accordingly, the cases cited by the Division do not support its denial of Cox's and Radio South's Counterproposals.

C. The Division Treated Cox's and Radio South's Counterproposals Differently Than Other Proposals That Are Contingent on the Finality of the Anniston/College Park Decision.

Since March 2001 when Preston Small filed his second petition for reconsideration in the Anniston/College Park Proceeding, the Division has taken actions consistent with the notion that proposed facilities changes were not required to protect WWWQ(FM)'s deleted Anniston allotment. In addition to its actions within the Auburn Proceeding, the Division has granted or accepted the following applications or accepted petitions for rule making that do not protect the

²⁶ See 47 C.F.R. § 1.429(k) ; *Amendment of Section 1.420(f) of the Commission's Rules Concerning Automatic Stays of Certain Allotment Orders, Report and Order*, 11 FCC Rcd 9501, ¶ 11 (Aug. 8, 1996). In affirming a grant of an allotment proposal when a petition for reconsideration was pending in a separate, interrelated proceeding, the Commission noted that such action was proper because its rules "no longer prohibit the grant and construction of authorized facilities pending final resolution of a related, outstanding rulemaking proceeding." *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Chester, Shasta Lake City, Alturas, McCloud, Weaverville, and Shingletown, CA)*, 16 FCC Rcd 4009, ¶ 4 (2000).

deleted Anniston allotment and are contingent upon finality of the Anniston/College Park Proceeding.

1. WWWQ(FM), College Park, Georgia.

On November 14, 2000, the Division granted the construction permit application filed by WNNX-LICO, Inc. for WWWQ(FM) in College Park, Georgia, expressly conditioned on the outcome of the Anniston/College Park Proceeding (*see* FCC File No. BPH-20000714AAV).²⁷

2. WLXY(FM), Northport, Alabama.

On August 30, 2001, the Division granted a modification application filed by Radio South for WLXY(FM) in Northport, Alabama expressly conditioned on the outcome of the Anniston/College Park Proceeding (*see* FCC File No. BPH-19991012AAG).²⁸

3. Notice of Proposed Rulemaking for Amendments to FM Table of Allotments for Meridianville, Tuscumbia, Carrollton, and Gurley, Alabama.

As recently as May 17, 2002, the Division issued a Notice of Proposed Rule Making that proposed an allotment change that does not protect the deleted Anniston allotment (the “Meridianville NPRM”).²⁹ In response to a petition for rulemaking filed by Capstar TX Limited Partnership and Clear Channel Broadcasting Licenses, Inc., the Meridianville NPRM proposes,

²⁷ Condition 7 on the construction permit states, “The grant of this permit is conditioned on the final outcome of MM Docket 98-112. The final outcome of that proceeding may require WHMA-FM to change frequency, class, or site location. Accordingly, any construction undertaken pursuant to this permit is at the permittee’s sole risk.”

²⁸ Condition 5 on the construction permit states, “The grant of this construction permit is conditioned on the final outcome of MM Docket 98-112. The final outcome of the proceeding may require Station WLXY(FM) to change frequency, class, site location or dismantle the facilities authorized herein. Accordingly, any construction pursuant to this permit is at the sole risk of the permittee.”

²⁹ *Amendment of Section 73.202(b), FM Table of Allotments, FM Broadcast Stations (Meridianville, Tuscumbia, Carrollton, and Gurley, Alabama), Notice of Proposed Rulemaking*, MB Docket 02-114, RM-10426, 17 FCC Rcd 8890 (May 17, 2002) (the “Meridianville NPRM”).

among other things, to delete Channel 262C1 from Tuscumbia, Alabama and allot Channel 262C2 to Meridianville, Alabama, and modify the license of WLAY-FM accordingly.³⁰ As described in Figure 2 of the Technical Exhibit to the petition, the proposed allotment of Channel 262C2 at Meridianville is short-spaced to the deleted Anniston allotment.³¹ The Division accepted the petition for rule making and in the Meridianville NPRM states, “We believe that each proposal warrants consideration because it complies with our technical requirements and would serve the public interest.”³² Yet, in the Auburn Decision released just three months later, the Division stated that Cox’s and Radio South’s Counterproposals did not comply with the technical requirements because they are short-spaced to the deleted Anniston allotment.

4. WWWQ(FM), College Park, Georgia.

In addition, at least one other application has been accepted but is being held in abeyance pending the outcome of the Anniston/College Park Proceeding. On January 12, 2001, WWWQ(FM) filed a construction permit application for a one-step upgrade from Channel 263C3 to Channel 263C2 at College Park, Georgia (*see* FCC File No. BPH-20010112ABQ). This application has been accepted for filing but remains pending until finality in the Anniston/College Park Proceeding.

As discussed above, the Division has granted at least two applications that were short-spaced to the Anniston allotment, issued at least two notices of proposed rulemaking (the Auburn NPRM and the Meridianville NPRM) that proposed an allotment short-spaced to the Anniston

³⁰ *Id.*

³¹ Petition for Rulemaking in the Matter of Amendment of Section 73.202(b), FM Table of Allotments, FM Broadcast Stations (Meridianville, Tuscumbia, Carrollton, and Gurley, Alabama) filed by Capstar TX Limited Partnership, Clear Channel Broadcasting Licenses, Inc., MB Docket 02-114 (Sept. 20, 2001).

³² Meridianville NPRM at ¶ 1 (emphasis added)

allotment, and has held at least one application in abeyance pending finality of the Anniston-College Park Proceeding. Yet, the Division did not afford the same treatment to Cox's and Radio South's Counterproposals. Attached as Exhibit A is a chart with a timeline of key dates and actions in the Anniston/College Park Proceeding vis a vis the Auburn Proceeding and the applications and petition for rulemaking discussed above. As the chart demonstrates, since February 2001, the Division has demonstrated by its actions in the Auburn Proceeding and other proceedings that the pendency of a petition for reconsideration in the Anniston/College Park Proceeding did not matter. Only with respect to Cox's and Radio South's Counterproposals did the Division suddenly determine that a pending petition for reconsideration bars their grant.

Moreover, applications and petitions for rulemaking or counterproposals are subject to the same distance separation rules and therefore should be treated in the same manner. Section 73.208(a)(1), which governs rulemaking petitions or counterproposals, and Section 73.208(b), which governs applications, both provide that applicants or petitioners, as the case may be, must meet distance separations determined by considering the coordinates of an authorized transmitter site (*i.e.*, the licensed site for WWWQ(FM) at Anniston that was relied upon in the Auburn Decision).³³

The Division's disparate treatment of Cox's and Radio South's Counterproposals violates the mandate of *Melody Music, Inc. v. FCC*.³⁴ No difference exists among Cox's Counterproposal, Radio South's Counterproposal, ANI's Updated Proposal, and these other proposals. Yet, the Division has treated Cox and Radio South differently than other similarly-situated applicants, and this disparate treatment is prohibited by *Melody Music*.

³³ Sec. 47 C.F.R. §§ 73.208 (a)(1), (b) (2001).

³⁴ *Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965) ("*Melody Music*").

IV. CONCLUSION.

For the reasons stated herein, the Division's denial of Cox's and Radio South's Counterproposals must be reversed. The Auburn Decision (i) constitutes an arbitrary and capricious reversal of position within the same proceeding, (ii) misapplies *Cut and Shoot*, (iii) relies on inapposite cases, and (iv) without good cause, treats Cox and Radio South differently than other similarly-situated applicants.

Due to the unique circumstances surrounding the multiple appeals in the Anniston/College Park Proceeding and the fact that the Division invited comments and counterproposals on ANI's Updated Petition, which was itself contingent on finality of the Anniston/College Park Proceeding, Cox and Radio South had little choice but to file their counterproposals in accord with the public notice issued by the Commission. Before Cox and Radio South filed their counterproposals, WWWQ(FM) had constructed its College Park facilities and filed a license application, and, importantly, the Commission had deleted the Anniston channel allotment. Cox and Radio South therefore had the right when they filed their counterproposals to assume that the pendency of the Anniston/College Park Proceeding was not an issue and relied upon the Division's actions to proceed accordingly. By seeking reconsideration of the Auburn Decision, Cox and Radio South are simply seeking consistent treatment under and application of current policies and precedent. Cox and Radio South request

that the Division grant their counterproposals³⁵ and hereby confirm that, if necessary for the consistent application of FCC policy and precedent, they are willing to accept a grant conditioned on the outcome of the Anniston/College Park Proceeding and are willing to implement the rulemaking and bear the risk of an adverse outcome in the Anniston/College Park Proceeding.

As the Division itself has demonstrated by its actions, the lack of finality of the Anniston/College Park Proceeding has never been a bar to granting Cox's and Radio South's Counterproposals. Dismissal of these counterproposals was wholly inconsistent with the Division's prior actions and applicable precedent, violates the mandate of *Melody Music*, and

³⁵ All interested parties had an opportunity to comment on Cox's and Radio South's Counterproposals both during the reply period of the Auburn Proceeding, which ended on July 3, 2001, and during the fifteen-day period after Cox's and Radio South's Counterproposals were placed on their own public notice on October 23, 2001. Any interested parties that noted that the Auburn NPRM proposed an allotment that did not protect the deleted Anniston allotment had every opportunity to file a counterproposal or comments to support its position. To place Cox's and Radio South's Counterproposals on a further public notice at this time or to solicit the filing of counterproposals to Cox's and Radio South's Counterproposals would be contrary to the Commission's longstanding allotment policies and procedures. In its allotment proceedings, the Commission has never solicited the filing of counterproposals to counterproposals. In similar circumstances where an allotment proposal initially was dismissed for being defective but, upon reconsideration, was granted due to changed circumstances that rendered the proposal acceptable, the Commission granted the proposal based on changed circumstances without requiring that the proposal be placed on another public notice for comment or counterproposals. See *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Alva, Mooreland, Tishomingo, Tuttle and Woodward, OK)*, MM Docket 98-155, 2002 FCC Lexis 3796, ¶ 4 (2002); *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Winslow, Camp Verde, Mayer and Sun City West, Arizona)*, MM Docket No. 99-246, 2002 FCC Lexis 3797 (2002). To establish such a new policy during the reconsideration stage of an FM allotment proceeding would wreak havoc with the Commission's interests in preserving the efficiency of process and conservation of scarce administrative resources. Moreover, Cox's and Radio South's petition for reconsideration will be placed on public notice pursuant to 47 C.F.R. § 1.429(e), and interested parties then will have ample notice and opportunity to file pleadings to support their positions.


raises significant equitable concerns. Based upon the foregoing, Cox and Radio South respectfully urge the Division to reconsider its decision in this proceeding and grant Cox's and Radio South's Counterproposals.

Respectfully submitted,

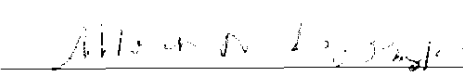
COX RADIO, INC.
CXR HOLDINGS, INC.

RADIO SOUTH, INC.

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October 9, 2002

ATTACHMENT A

CHRONOLOGY OF KEY DATES AND ACTIONS

DATE	ANNISTON/COLLEGE PARK PROCEEDING	AUBURN PROCEEDING	OTHER GRANTED OR ACCEPTED PROPOSALS THAT ARE CONTINGENT ON FINALITY OF ANNISTON/COLLEGE PARK PROCEEDING
April 28, 2000	<i>Report and Order</i> released by Division.		
June 14, 2000	<i>Report and Order</i> becomes effective.		
June 16, 2000	Petition for reconsideration filed by Preston Small.		
July 5, 2000		Initial petition for rulemaking filed by Auburn Network, Inc. ("ANI's Initial Petition").	
November 14, 2000	WWWQ(FM) construction permit for College Park facilities granted by Division.		WWWQ(FM) construction permit for College Park facilities granted by Division.
November 20, 2000		ANI's Initial Petition returned by Division because it was contingent on finality of the Anniston/College Park Proceeding.	
January 9, 2001	WWWQ(FM) license application to cover constructed College Park facilities filed.		

DATE	ANNISTON/COLLEGE PARK PROCEEDING	AUBURN PROCEEDING	OTHER GRANTED OR ACCEPTED PROPOSALS THAT ARE CONTINGENT ON FINALITY OF ANNISTON/COLLEGE PARK PROCEEDING
January 12, 2001			WWWQ(FM) construction permit application filed for a one-step upgrade from Channel 263C3 to Channel 263C2 at College Park.
January 22, 2001	WWWQ(FM) program test authority to operate College Park facilities granted by Division.		
February 7, 2001	Memorandum Opinion and Order dismissing petition for reconsideration adopted by Division.	Updated petition for rulemaking filed by Auburn Network, Inc. ("ANI's Updated Petition").	
February 9, 2001	Memorandum Opinion and Order dismissing petition for reconsideration released.		
March 12, 2001	Second petition for reconsideration filed by Preston Small.		
March 30, 2001	Second petition for reconsideration refiled by Preston Small.		
April 4, 2001		ANI's Updated Petition returned by Division because it failed to protect the pending one-step upgrade application of WWWQ(FM) at College Park.	
April 6, 2001		Supplement to ANI's Updated Petition filed by Auburn Network, Inc.	

DATE	ANNISTON/COLLEGE PARK PROCEEDING	AUBURN PROCEEDING	OTHER GRANTED OR ACCEPTED PROPOSALS THAT ARE CONTINGENT ON FINALITY OF ANNISTON/COLLEGE PARK PROCEEDING
April 27, 2001		Notice of Proposed Rulemaking released by Division for Updated Petition, as supplemented.	
June 18, 2001		Counterproposal filed by Cox. ("Cox's Counterproposal") Counterproposal filed by Radio South, Inc. ("Radio South's Counterproposal").	
August 30, 2001			WLXY(FM) construction permit application granted by Division contingent on finality of the Anniston/College Park proceeding.
October 23, 2001		Public Notice released accepting Cox's and Radio South's Counterproposals.	
November 8, 2001	Memorandum Opinion and Order dismissing second petition for reconsideration released by Commission.		
December 5, 2001	Third petition for reconsideration and motion to reopen the record filed by Preston Small		
May 17, 2002			Notice of Proposed Rulemaking for Meridianville, Tusculumbia, Carrollton, and Gurley, Alabama, released by Division.

DATE	ANNISTON/COLLEGE PARK PROCEEDING	AUBURN PROCEEDING	OTHER GRANTED OR ACCEPTED PROPOSALS THAT ARE CONTINGENT ON FINALITY OF ANNISTON/COLLEGE PARK PROCEEDING
July 15, 2002	Memorandum Opinion and Order dismissing third petition for reconsideration released by Commission.		
August 19, 2002	Fourth petition for reconsideration and second motion to open the record filed by Preston Small.		
August 22, 2002	Motion for leave to file supplement to petition for reconsideration and second motion to open the record filed by Preston Small.		
August 30, 2002		Report and Order dismissing Cox's and Radio South's Counterproposals released.	
September 3, 2002	Statement for the Record, Motion for Protection, and Notice of Resubmission of Petition for Reconsideration and Second Motion to Reopen the Record and Notice of Resubmission of Motion to [sic] for Leave to File Supplement filed by Preston Small and concurrent resubmission of August 19, 2002 and August 22, 2002 filings by Preston Small.		

CERTIFICATE OF SERVICE

I, Constance A. Randolph, a secretary at Dow, Lohnes & Albertson, PLLC, hereby certify that a true and correct copy of the foregoing "Petition for Reconsideration of Cox Radio, Inc., CXR Holdings, Inc., and Radio South, Inc." was sent on this 9th day of October, 2002, via first-class United States mail, postage pre-paid, to the following:

Auburn Network, Inc.
c/o Lee G. Petro, Esq.
Gardner, Carton & Douglas
1301 K Street, N.W.
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Washington, D.C. 20005-3317

Williamson Broadcasting, Inc.
702 East Battle Street, Suite A
Talladega, AL 35161

Marengo Broadcast Associates
5256 Valleybrook Trace
Birmingham, AL 35244

Scott Communications, Inc.
273 Persimmon Tree Road
Selma, AL 36701

Dale Broadcasting, Inc.
P. O. Box 909
Alexander City, AL 35051

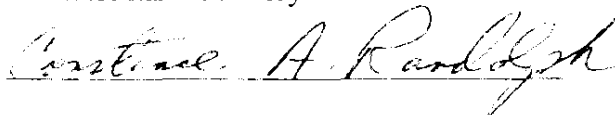
Southeastern Broadcasting Co.
P.O. Box 1820
Clanton, AL 35045

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Washington, DC 20005
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*denotes hand delivery



Constance A. Randolph